

Decision 03-10-038 October 16, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7, 1993)

(Verizon UNE Phase)

OPINION MODIFYING DECISION 03-03-033 REGARDING NONRECURRING PRICES AND CUSTOMER NOTIFICATION OF PRICE FLOOR CHANGES

I. Summary

This decision resolves two outstanding petitions for modification of Decision (D.) 03-03-033. First, the Commission denies Verizon California Inc.'s (Verizon) request for an extension until March 2004 to implement the nonrecurring prices adopted in D.03-03-033. Instead, Verizon may defer billing for nonrecurring charges, with interest, until its billing system changes are complete. Second, the Commission agrees with Verizon that customer notification of potential price floor changes is duplicative of existing General Order (GO) 96-A requirements that contracts must inform customers of the potential for contract modifications by the Commission. Although the additional notice requirement is removed, the intent of D.03-03-033 is left intact that

contract prices based on interim price floors are subject to adjustment once final price floors are adopted in a later phase of this proceeding.

II. Background

In D.03-03-033, the Commission set interim rates for a subset of network elements (UNEs) that Verizon sells to competitive local exchange carriers. In addition, the order adopted prices for the initial fees that competitors pay Verizon to order and provision the use of unbundled network facilities. These initial fees are known as “nonrecurring prices.” The Commission ordered Verizon’s nonrecurring prices to take effect 75 days after D.03-03-033, or May 27, 2003. Finally, D.03-03-033 made modifications to the formula that Verizon may use, on an interim basis, to calculate price floors for some of its retail services.

Verizon requests modification of D.03-03-033 on two issues.¹ First, Verizon seeks an extension of the schedule for implementing the newly adopted nonrecurring prices. Second, Verizon requests that the Commission eliminate a requirement that it provide customer notification of potential price floor changes.

Comments on Verizon’s petitions were filed in four groups: AT&T Communications of California, Inc., WorldCom Inc., Covad Communications Company, and XO Communications (collectively the AT&T parties); Tri-M Communications Inc., Sage Telecom, and Call America (collectively, the TMC Parties); the Office of Ratepayer Advocates, the Utility Reform Network, and XO (collectively the ORA parties); and Telscape Communications Inc. (Telscape).

¹ Verizon also seeks modification on a third issue relating to rates for switch features, which the Commission is handling through a separate order.

III. Petition to Modify Regarding Nonrecurring Prices

Verizon requests that the Commission suspend the schedule for implementing the nonrecurring prices adopted in D.03-03-033, and grant an extension until March 2004 for implementing these prices.² Verizon argues that an extension is warranted because the nonrecurring prices adopted in D.03-03-033 require fundamental changes to Verizon's ordering and billing systems which cannot be accomplished in the 75-day time period established in that order. Specifically, Verizon contends that the changes to distinguish between mechanized and semi-mechanized service orders, establish separate charges for initial and additional orders, set new connect and disconnect charges, and capture customer record changes cannot be implemented until Verizon completes and tests extensive system changes. In addition, Verizon personnel who would implement these changes are currently working on various other system changes and cannot begin work on nonrecurring price changes until mid-June 2003. According to Verizon, changes of this magnitude also require a 73-day time period for testing prior to implementation. As part of its request, Verizon suggests that if a delay to March 2004 is granted, the difference between current rates and the new nonrecurring prices would be refunded so that competitive local carriers (CLCs) would not suffer injury from the delayed implementation.

Parties generally opposed Verizon's extension request because it would maintain, for yet another year, what CLCs consider grossly inflated nonrecurring

² As part of its petition, Verizon requested a ruling from the ALJ suspending the effective date of the new nonrecurring prices. This suspension request was denied in an ALJ ruling of May 27, 2003.

prices. To illustrate this point, the AT&T Parties maintain that Verizon would continue to charge \$52.68 for ordering a UNE loop, switch, and port (also known as a UNE-P conversion), whereas D.03-03-033 reduced the price for that same UNE-P conversion to 32 cents. These parties allege that failure to implement the new and vastly lower nonrecurring prices, even with the promise of a later refund, will create a substantial barrier to entry for most CLCs who will have to pay the higher nonrecurring prices up front when they place UNE orders.

Instead, the AT&T Parties urge the adoption of the interim solution set forth in the ALJ's ruling of May 27, 2003 that denied Verizon's request to suspend the effective date of nonrecurring price changes. In that ruling, the ALJ found that Verizon should defer billing the new nonrecurring prices until it can render correct bills, and it should treat orders as "mechanized" if it cannot determine their origin. In support of this arrangement, the AT&T Parties contend that deferred billing will be closer to the true prices Verizon should charge, whereas Verizon's proposal of continuing to charge much higher nonrecurring prices could lead to a massive true-up. Moreover, the AT&T Parties maintain that the additional year Verizon requests to implement its nonrecurring prices is unreasonable since Verizon has known since 1998 that the nonrecurring costs adopted in that year, plus 22% for shared and common costs, were vastly lower than the nonrecurring prices it has been charging CLCs. Finally, the AT&T Parties suggest that deferring charges, without interest, gives Verizon the proper incentive to expedite corrections to its billing system.

The TMC Parties propose that Verizon waive all nonrecurring charges until it can bill according to the structure adopted in D.03-03-033. They contend that this will act as an incentive to speed Verizon's compliance with implementing new nonrecurring prices and is an appropriate penalty for

Verizon's failure to implement the new prices within the time allotted by the Commission. In the alternative, the TMC Parties suggest that Verizon charge only the lowest applicable rate in any category until the new nonrecurring prices are in place. The TMC Parties oppose a true-up or interest payments to Verizon because they contend the CLCs have incurred a much greater cost in business opportunities lost due to what they consider Verizon's inflated UNE prices. Similarly, Telscape proposes that the Commission fine Verizon for missing the implementation date in D.03-03-033. It also proposes that Verizon bill only the lowest applicable rate during the interim.

Verizon opposes a fine, saying it has not violated any Commission order. Verizon states that if an extension until March 2004 is granted, it will pay interest on any overcollections when the new prices are implemented. If its extension request is denied, Verizon proposes that in the interim, it should charge the lowest applicable rate in any category in which the proper charge cannot be determined. Verizon will track the correct charges, and will present deferred bills, with appropriate interest, when the new nonrecurring prices are implemented.

Discussion

Despite the fact that new nonrecurring prices were adopted in March 2003, Verizon is essentially asking that it be able to continue to charge its old nonrecurring rates for an additional year. We will deny this request because it is unreasonable to allow Verizon to continue to charge nonrecurring prices that are out of date for such an extended period. Moreover, this lengthy delay would not give Verizon the proper incentive to expedite its billing changes. In D.03-03-033, the Commission gave Verizon 75 days to implement the new rates. For comparison purposes, the Commission often makes new rates effective on the

date of the order, and gives carriers 60 days to implement billing changes. (See D.02-05-042, Ordering Paragraphs 4 and 5, and D.02-09-052, Ordering Para. 4.) Verizon indicates that it is working on other changes to its billing systems, and cannot begin the changes regarding nonrecurring prices until the other changes are completed. While we understand that changes to billing systems take time, conflict with other priorities, and require experienced personnel who may be working on projects, this does not justify Verizon charging rates that the Commission has found are unreasonable.

Instead, we prefer to maintain the effective date that we adopted in D.03-03-033, and allow Verizon to defer billing for nonrecurring charges, with interest, until its billing system changes are complete. If Verizon is unable to determine the type of orders it receives during this deferred billing period, it should assume the lowest rate in that category. Verizon itself offers a similar approach as its backup proposal. This maintains the proper incentive for Verizon to expedite its efforts to implement the new nonrecurring prices. Further, it eliminates the anti-competitive concerns raised by Verizon's proposal, wherein CLCs would continue to pay nonrecurring prices that are orders of magnitude greater than the newly adopted rates.

The approach adopted herein mirrors the approach adopted in the ALJ's ruling of May 27, 2003, although we will allow Verizon to collect interest at the three-month commercial paper rate for its deferred billings. Although several parties opposed allowing Verizon to collect interest, we will allow it as a reasonable compromise given the other billing changes that Verizon must implement at the same time. The nonrecurring prices adopted in D.03-03-033 became effective on May 27, 2003 and this shall remain unchanged. We will modify Ordering Paragraph 7 of D.03-03-033 to add the following language:

If Verizon cannot bill nonrecurring charges at the effective rate, it should track the types of orders it receives and defer billing until it can render a correct bill. Verizon may include interest at the three-month commercial paper rate on its deferred bills. If Verizon is unable to track the types of orders it receives during this deferred billing period, it should assume the lowest rate in any category in which the proper charge cannot be determined.

Therefore, Verizon's petition to change the effective date for nonrecurring prices to March 2004 is denied, but D.03-03-033 is modified to allow deferred billing with interest as set forth above.

We deny the proposal of the TMC Parties to waive all nonrecurring charges until Verizon can implement its billing system changes because it would be improper to require Verizon to provide services to CLCs without any payment. We also deny Telscape's proposal to fine Verizon for failure to meet the 75-day effective date because the solution crafted in this order is preferable under the circumstances and we are not persuaded that punitive measure are necessary at this time.

IV. Petition to Modify Regarding Customer Notification of Price Floor Changes

In D.03-03-033, the Commission adopted a mechanism for Verizon to calculate interim price floors, using the interim rates adopted in that same order, until permanent UNE rates and price floors are set later in this proceeding. At the same time, the Commission conditioned Verizon's ability to calculate interim price floors on a requirement that Verizon "make clear in any contracts that it enters into with customers based on these interim Category II price floors that the prices in the contract are subject to change upon adoption of final price floors by the Commission in the later phase of this case." (D.03-03-033, mimeo. at 52.) This condition was articulated in Ordering Paragraph 9 of the order.

Verizon requests that the Commission eliminate Ordering Paragraph 9 from D.03-03-033 for three reasons. First, Verizon maintains that this notification requirement is unnecessary given the existing notice required by GO 96-A.³ Verizon states that the customer notification requirement is superfluous because :

The ability of the Commission to regulate utility prices is unquestioned, and the courts have long held that the Commission may override private pre-existing contracts between utilities and customers in the proper exercise of its police power. [Footnote omitted.] (Reply of Verizon, 6/23/03, p. 5.)

Second, Verizon maintains that the additional notice requirement is anti-competitive because no other carriers are required to notify customers that prices may change. For example, CLCs may adjust their customer rates once final UNE prices are set, but they are not required to notice this to their customers. Third, Verizon contends that Commission precedent, particularly in D.94-09-065 (the “IRD Decision”), strongly favors honoring approved contracts.⁴ Verizon states that reopening fixed term contracts “flies in the face of common-sense notions of business stability” and that term contracts entered into under Commission rules should be honored. (Verizon Petition on Customer Notification, 5/12/03, p. 5.) Verizon states that the notice requirement will cause customer uncertainty and

³ GO 96-A requires that contracts state: This Agreement shall at all times be subject to such changes or modifications by the Commission as the Commission may from time to time direct in the exercise of its jurisdiction. (*See* GO 96-A, Section IX and X.A.)

⁴ *See* Verizon Petition on Customer Notification, 5/12/03, pps. 5-6, citing the IRD Decision, mimeo. at 243. The IRD Decision revised incumbent carriers’ tariff rates but did not allow customers to terminate contracts in favor of the cheaper tariff rates.

impair its ability to enter into contracts because Verizon will be unable to tell customers whether, when or how a new price might take effect.

The ORA Parties oppose Verizon's request. They contend that Verizon is not only asking to eliminate the customer notification requirement, but is also seeking to overturn the condition that price floors in contracts will be adjusted upon the adoption of permanent price floors. The ORA Parties maintain that the notice requirement is warranted because Verizon is in the unique situation of being allowed to enter long-term contracts with customers based on interim price floors. Further, they contend that Verizon's citation to the IRD Decision involves a completely different set of circumstances and has nothing to do with the customer notification required in D.03-03-033.

Discussion

On first blush, Verizon appears to ask merely for relief from notifying customers that contract prices may change when permanent price floors are adopted. On closer examination, however, Verizon clearly opposes disruption of any customer contracts when permanent price floors are adopted. Thus, it appears that Verizon wants removal of the notice requirement as well as removal of any language suggesting that interim price floors will be changed when permanent price floors are set.

We agree with Verizon that any notice to customers beyond that contained in GO 96-A is unnecessary. As Verizon points out, the Commission's authority to change rates is unquestioned. That being said, we cannot agree to eliminate Ordering Paragraph 9 in its entirety, as Verizon proposes, because this would raise ambiguity about whether interim price floors are subject to change upon adoption of final price floors. Although we will drop additional customer notification requirements beyond those in GO 96-A, we will not modify the

language in D.03-03-033 that specified that prices in customer contracts are subject to change upon adoption of final price floors.

We agree with the ORA Parties that this is a unique circumstance wherein the Commission is allowing Verizon to enter long-term contracts based on interim price floors, in advance of a determination of the correct level for these price floors. In D.03-03-033, the Commission clearly stated that interim price floors will be replaced with new ones when they are adopted. (D.03-03-033, p. 52.) Although the Commission denied a proposal to “true-up,” or retroactively adjust price floors, the Commission was quite clear that prices in customer contracts would be subject to change upon adoption of final price floors. (*Id.*) We will not modify this language because we are unwilling to allow Verizon to lock in contract rates before we have determined Verizon’s actual price floors. This is distinguishable from the circumstances discussed in the IRD Decision, which did not allow customers out of contracts so they could opt into cheaper tariff rates. Here, it is not reasonable to allow Verizon to sustain potentially anti-competitive contracts by charging below cost prices if later price floors are found to be higher.

Therefore, we will grant Verizon’s petition for modification in part in that we will modify the second full paragraph on p. 52 of D.03-03-033 as follows (new language is underlined):

Joint Commenters suggest that some sort of true-up mechanism is necessary if these interim price floors are too low. In D.99-12-018, the Commission did not establish a true-up mechanism for interim price floors. Clearly, in the final phase of this case when the Commission sets final UNE rates for Verizon, new prices floors will be adopted. At that time, any interim price floors will be replaced with new ones, but we will not institute any kind of true-up mechanism. In other words, Verizon is not required to modify contracts retroactively to

charge new price floors. We will, however, require Verizon to make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission if contract prices are below the new price floors. Verizon should ensure that its contracts adhere to the existing requirements of General Order 96-A to notify customers that agreements are subject to change or modification by the Commission.

COL 30 should be modified to read:

Verizon should make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission and should adhere to GO 96-A requirements to notify customers that contracts are subject to change or modification.

Ordering Paragraph 9 of D.03-03-033 is modified to state:

Verizon shall make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission if contract prices are below the newly adopted price floors.

V. Comments on Draft Decision

The Commission mailed the draft decision of the ALJ in this matter to the parties in accordance with Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. There were no comments filed on the draft decision.

VI. Assignment of Proceeding

Commissioner Michael R. Peevey is the Assigned Commissioner and Dorothy Duda is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. In D.03-03-033, the Commission set new nonrecurring prices for Verizon which took effect on May 27, 2003.

2. Verizon has not completed the billing system changes necessary to charge CLCs the nonrecurring prices adopted in D.03-03-033.

3. In D.03-03-033, the Commission stated that any contracts entered into with customers based on the price floors adopted in that order would be subject to change upon adoption of final price floors.

4. Under GO 96-A, Verizon is required to state in customer contracts that the contracts are subject to change or modification by the Commission.

5. D.03-03-033 allows Verizon to enter long-term contracts based on interim price floors, in advance of a determination of Verizon's actual price floors.

Conclusions of Law

1. Verizon's request to allow it to continue to charge its former nonrecurring prices until March 2004 is unreasonable and does not give Verizon the proper incentives to implement the new rates.

2. Verizon should defer billing for nonrecurring charges, with interest, until its billing system changes are complete.

3. The following language should be added to Ordering Paragraph 7 of D.03-03-033:

If Verizon cannot bill nonrecurring charges at the effective rate, it should track the types of orders it receives and defer billing until it can render a correct bill. Verizon may include interest at the three-month commercial paper rate on its deferred bills. If Verizon is unable to track the types of orders it receives during this deferred billing period, it should assume the lowest rate in any category in which the proper charge cannot be determined.

4. The customer notification required in D.03-03-033 goes beyond that required by GO 96-A and is unnecessary.

5. Because Verizon's actual price floors have yet to be determined, the Commission should not modify language that states that prices in customer contracts will be subject to change upon adoption of final price floors.

6. The second full paragraph on page 52 of D.03-03-033 should be modified as follows (new text is underlined):

Joint Commenters suggest that some sort of true-up mechanism is necessary if these interim price floors are too low. In D.99-12-018, the Commission did not establish a true-up mechanism for interim price floors. Clearly, in the final phase of this case when the Commission sets final UNE rates for Verizon, new prices floors will be adopted. At that time, any interim price floors will be replaced with new ones, but we will not institute any kind of true-up mechanism. In other words, Verizon is not required to modify contracts retroactively to charge new price floors. We will, however, require Verizon to make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission if contract prices are below the new price floors. Verizon should ensure that its contracts adhere to the existing requirements of General Order 96-A to notify customers that agreements are subject to change or modification by the Commission.

7. Conclusion of Law 30 of D.03-03-033 should be replaced with the following:

Verizon should make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission and should adhere to GO 96-A requirements to notify customers that contracts are subject to change or modification.

8. Ordering Paragraph 9 of D.03-03-033 should be replaced with the following:

Verizon shall make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission if contract prices are below the newly adopted price floors.

O R D E R

IT IS ORDERED that:

1. The May 12, 2003 petition of Verizon California Inc. (Verizon) to modify Decision (D.) 03-03-033 to suspend the schedule for implementing revisions to the nonrecurring price structure is denied.
2. The May 12, 2003 petition of Verizon to modify Ordering Paragraph 9 of D.03-03-033 regarding customer notification of price changes is granted in part, as set forth in this order, and denied in all other respects.
3. D.03-03-033 is modified as set forth in this order.

This order is effective today.

Dated October 16, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

APPENDIX A

Revised Ordering Paragraphs for Decision 03-03-033¹

IT IS ORDERED that:

1. The monthly recurring prices for unbundled network elements (UNEs) offered by Verizon California, Inc. (Verizon) that are set forth in Appendix A to this decision satisfy the requirements of Sections 251(c)(2), 251(c)(3), and 252(d)(1) of the Telecommunications Act of 1996 and are hereby adopted on an interim basis and made subject to adjustment, either up or down, from today's date until final prices are adopted.

2. Verizon shall prepare amendments to all interconnection agreements between itself and other carriers substituting the interim monthly recurring prices for UNEs set forth in Appendix A of this order for the UNE prices set forth in such interconnection agreements. Such amendments shall be filed with the Commission's Telecommunications Division, pursuant to the advice letter process set forth in Rules 6.2 and 6.2 of Resolution ALJ-181, within 30 days after the effective date of this order. The amendments do not require a signature of the carriers involved as long as the amendments are limited to substituting the UNE rates adopted in today's order. Unless protested, such amendments will become effective 30 days after filing.

¹ This appendix incorporates revisions contained in the body of this order as well as revisions ordered in D.03-08-029, issued on 8/22/03.

3. The interim UNE prices set forth in Appendix A of this order shall be effective on the date this order is effective. Verizon shall make all billing adjustments necessary to ensure that this effective date is accurately reflected in bills applicable to these UNEs, except that the rate for any CentraNet switch feature that Verizon currently offers in California and for which a non-zero rate is contained in Appendix A (listed as “billed features”) shall be set at zero, subject to true-up. The listing of individual features in Appendix A is not intended to either restrict or expand the availability of CentraNet switch features offered in California.

4. Verizon shall have 60 days from the effective date of this order to complete the billing program changes necessary to reflect in bills the interim monthly recurring prices for UNEs adopted in this order. Upon completion of said billing program changes, Verizon shall notify the Director of the Telecommunications Division in writing that all of the necessary billing program changes have been completed.

5. Within 10 days of the effective date of this order, Verizon shall file an advice letter to establish a balancing account to track the revenues received from the interim monthly UNE rates adopted herein, beginning on the same date the interim rates become effective. The balancing account should accrue interest at the three-month commercial paper rate. Unless protested, the advice letter shall become effective five days after filing.

6. Verizon shall make the following changes to its nonrecurring charge proposal:

- Verizon should configure its order processing system in order to charge separate rates depending on whether the CLC employs a mechanized, semi-mechanized, or manual system to place its order.
- Verizon should separate its charges for initial and additional orders so that CLCs only pay for additional orders when they make them.
- Verizon should not collect disconnect charges in advance, as it proposes, because this is a requirement placed on CLCs that Verizon does not bear itself.
- Verizon should charge separately for Record Orders so that only those CLCs that actually make record changes pay the charge.
- Verizon should add a markup of 22% to its nonrecurring charges, once the changes above are made.

7. Verizon's nonrecurring charge proposal is adopted, with the modifications set forth in this order. Within 20 days from the effective date of this order, Verizon shall file and serve a revised list of its nonrecurring charges complying with the changes set forth in this order. Interested parties shall have 14 days to comment on that filing, unless the assigned Administrative Law Judge (ALJ) adopts a different schedule for responses. Verizon's nonrecurring charges shall go into effect 75 days after the effective date of this decision, unless the assigned ALJ issues a ruling suspending this effective date pending further Commission action. If Verizon's revised nonrecurring charges are suspended, the existing nonrecurring charges shall remain in effect, subject to refund from the 75th

day after the effective date of this order, until all outstanding issues with nonrecurring charges are resolved. If Verizon cannot bill nonrecurring charges at the effective rate, it should track the types of orders it receives and defer billing until it can render a correct bill. Verizon may include interest at the three-month commercial paper rate on its deferred bills. If Verizon is unable to track the types of orders it receives during this deferred billing period, it should assume the lowest rate in any category in which the proper charge cannot be determined.

8. When submitting an advice letter to the Commission regarding interim Category II price floors, Verizon shall calculate interim price floors according to the formula described in this order.

9. Verizon shall make prospective adjustments to the prices in any of its customer contracts upon the adoption of final price floors by the Commission if contract prices are below the newly adopted price floors.

10. Verizon's petition to take official notice of UNE rates adopted for Verizon in Florida on October 14, 2002 is granted.

11. Joint Commenters' November 22, 2002 motion to strike Verizon's November 12, 2002 reply comments is granted.

12. The May 31, 2002 ruling of the Assigned Commissioner and Administrative Law Judge is affirmed.

13. This proceeding shall remain open so that the Commission can determine final monthly recurring charges and price floors for Verizon's UNEs.

This order is effective today.

Dated March 13, 2003, at San Francisco, California.

(END OF APPENDIX A)